



\$~22

\*

**IN THE HIGH COURT OF DELHI AT NEW DELHI****Judgment reserved on: 04.09.2023**

%

**Judgment delivered on: 16.10.2023**

+

**W.P.(C) 9520/2018 & CM APPL. 37096/2018****NATIONAL FEDERATION OF THE BLIND ..... Petitioner****Through: Mr. S. K. Rungta, Senior Advocate  
with Mr. Prashant Singh, Advocate.****versus****KENDRIYA VIDYALAYA SANGTHAN & ORS..... Respondent****Through: Mr. S. Rajappa and Mr. R.  
Gourishankar, Advocates for R-1.  
Mr. Govind Manoharan, Ms. Diksha  
Tiwari, Ms. Apurva Singh, Mr.  
Anchit Singla and Ms. Nishchaiy,  
Advocates for R-2/ NCTE.  
Ms. Monika Arora, CGSC with Mr.  
Yash Tyagi and Mr. Subhrodeep  
Saha, Advocates for R-3/UOI.****CORAM:****HON'BLE THE CHIEF JUSTICE****HON'BLE MR. JUSTICE SANJEEV NARULA****J U D G M E N T****SATISH CHANDRA SHARMA, C.J.**

*“Equality is the public recognition, effectively expressed in institutions and manners, of the principle that an equal degree of attention is due to the needs of all human beings.”<sup>1</sup>*

---

<sup>1</sup>Simone Weil, French Philosopher



1. The *lis* before us is a petition falling in the domain of public interest litigation, rather more appropriately termed as social justice litigation. This Court has been approached by the National Federation of the Blind<sup>2</sup>, through its Secretary Sh. S.K. Rungta, Senior Advocate. The Federation has been espousing the cause of persons with visual disability on the legal front for a considerable period of time. To set a tone, the petitioner is aggrieved by the non-implementation of statutory reservation for Persons with Disabilities (PwDs), particularly for the blind persons, in recruitment process by the Kendriya Vidyalaya Sangathan (the respondent). The petitioner seeks the implementation of statutory and constitutional mandate regarding reservations for persons with visual disabilities.

### **The Challenge**

2. In this petition, the petitioner has assailed the Advertisement No. 14 published by the respondent Kendriya Vidyalaya Sangathan<sup>3</sup> in August, 2018 for recruitment at the posts of Principal, Vice Principal, PGTs, TGTs, Librarian etc. The advertisement indicates the number of vacancies earmarked for different categories – reserved and unreserved. As the devil always lies in details, the reserved vacancies are further bifurcated as per the vertical caste-based reservation criteria and horizontal reservation criteria for the persons with disabilities. Within the vacancies reserved for the persons with disabilities, the vacancies are further bifurcated, thereby indicating the vacancies reserved for different categories of disabilities – such as OH, HH, VH and Others. The impugned advertisement further reveals that the vacancies are reserved in a post-wise and subject-wise

---

<sup>2</sup> Hereinafter referred as “the Federation”

<sup>3</sup> Hereinafter referred as “the Sangathan”



manner. For instance, the Post of Principal has no vacancy for a person with visual disability, whereas the post of Vice-Principal carries a vacancy. Furthermore, within the same cadre, for instance PGTs, certain subjects have vacancies for one category of disability only and certain subjects have no vacancy at all for any disability, despite falling in the same cadre, as the case may be. For a ready reference, the vacancies, as tabulated in the advertisement, are reproduced thus:

*“Post-wise and Category wise break up of vacancies is as under:-*

**1. PRINCIPAL (GROUP-A)**

| UR | OBC | SC | ST | Total | OH | VH | HH | Others* |
|----|-----|----|----|-------|----|----|----|---------|
| 41 | 19  | 11 | 05 | 76    | 02 | 0  | 02 | 0       |

**2. VICE PRINCIPAL (Group-A)**

| UR  | OBC | SC | ST | Total | OH | VH | HH | Others* |
|-----|-----|----|----|-------|----|----|----|---------|
| 117 | 57  | 31 | 15 | 220   | 03 | 03 | 02 | 0       |

**3. POST GRADUATE TEACHERs (PGTs) (Group-B)**

| S NO. | Subject   | UR | OBC | SC | ST | Total | OH | VH | HH | Others* |
|-------|-----------|----|-----|----|----|-------|----|----|----|---------|
| 1     | HINDI     | 22 | 19  | 07 | 04 | 52    | 01 | 0  | 0  | 0       |
| 2     | ENGLISH   | 24 | 18  | 08 | 05 | 55    | 01 | 01 | 0  | 0       |
| 3     | PHYSICS   | 25 | 13  | 12 | 04 | 54    | 0  | 0  | 0  | 0       |
| 4     | CHEMISTRY | 29 | 17  | 09 | 05 | 60    | 0  | 0  | 0  | 0       |
| 5     | MATHS     | 28 | 16  | 08 | 05 | 57    | 02 | 0  | 0  | 0       |
| 6     | BIOLOGY   | 23 | 14  | 10 | 03 | 50    | 0  | 0  | 0  | 0       |



|       |           |     |     |    |    |     |    |    |   |   |
|-------|-----------|-----|-----|----|----|-----|----|----|---|---|
| 7     | HISTORY   | 28  | 15  | 08 | 05 | 56  | 01 | 01 | 0 | 0 |
| 8     | GEOGRAPHY | 28  | 20  | 08 | 05 | 61  | 01 | 01 | 0 | 0 |
| 9     | ECONOMICS | 28  | 16  | 08 | 04 | 56  | 01 | 01 | 0 | 0 |
| 10    | COMMERCE  | 21  | 10  | 11 | 03 | 45  | 01 | 0  | 0 | 0 |
| 11    | COMPT SC. | 21  | 14  | 06 | 05 | 46  | 0  | 0  | 0 | 0 |
| TOTAL |           | 277 | 172 | 95 | 48 | 592 | 08 | 04 | 0 | 0 |

#### 4. TRAINED GRADUATE TEACHERs (TGTs) (Group-B)

| Sl. NO | Subject                 | UR  | OB C | SC  | ST  | Total | OH | V H | HH | Others * |
|--------|-------------------------|-----|------|-----|-----|-------|----|-----|----|----------|
| 1      | HINDI                   | 134 | 71   | 40  | 20  | 265   | 04 | 04  | 0  | 0        |
| 2      | ENGLISH                 | 137 | 72   | 40  | 21  | 270   | 04 | 04  | 0  | 0        |
| 3      | SANSKRIT                | 61  | 36   | 18  | 09  | 124   | 02 | 02  | 0  | 0        |
| 4      | SCIENCE                 | 146 | 78   | 44  | 22  | 290   | 0  | 0   | 0  | 0        |
| 5      | MATHMATICS              | 96  | 51   | 34  | 14  | 195   | 06 | 0   | 0  | 0        |
| 6      | SOCIAL STUDIES          | 219 | 118  | 65  | 33  | 435   | 06 | 07  | 0  | 0        |
| 7      | P&HE                    | 45  | 31   | 14  | 07  | 97    | 0  | 0   | 0  | 0        |
| 8      | ART EDUCATION           | 50  | 34   | 15  | 08  | 107   | 02 | 0   | 01 | 01       |
| 9      | WORK EXPERIENCE TEACHER | 50  | 29   | 30  | 08  | 117   | 01 | 01  | 01 | 0        |
| TOTAL  |                         | 938 | 520  | 300 | 142 | 1900  | 25 | 18  | 2  | 01       |



5. *LIBRARIAN (Group-B)*

| UR | OBC | SC | ST | Total | OH | VH | HH | Others* |
|----|-----|----|----|-------|----|----|----|---------|
| 24 | 14  | 08 | 04 | 50    | 01 | 0  | 01 | 0       |

6. *PRIMARY TEACHER (Group-B)*

| UR   | OBC  | SC  | ST  | Total | OH | VH | HH | Others* |
|------|------|-----|-----|-------|----|----|----|---------|
| 2672 | 1431 | 798 | 399 | 5300  | 80 | 80 | 0  | 0       |

7. *PRIMARY TEACHER (MUSIC) (GROUP-B)*

| UR  | OBC | SC | ST | Total | OH | VH | HH | Others* |
|-----|-----|----|----|-------|----|----|----|---------|
| 101 | 54  | 31 | 15 | 201   | 03 | 03 | 0  | 0       |

\* *As per OM dated 15.01.2018 of DOPT the following categories to be given 1% reservation*

*(d) autism, intellectual disabilities, specific learning disabilities and mental illness*

*(e) multiple disabilities from amongst persons under clause (a) to (d) including deaf-blindness.*

*Note: The number of vacancies advertised is tentative and may vary. They may increase or decrease."*

3. Assailing the advertisement, it is submitted by Sh. S.K. Rungta, Ld. Senior Advocate and Secretary of the Federation, that the advertisement is in violation of Section-34 of the Rights of Persons with Disabilities Act, 2016<sup>4</sup> which mandates at-least four percent reservation for the persons with disabilities, out of which three categories of PwDs are entitled to one percent each of the reserved vacancies. It is further submitted that the advertisement has excluded the post of Principal from the posts reserved for persons with

<sup>4</sup> Hereinafter referred as "2016 Act"



visual disability, which is ex-facie discriminatory and violative of the 2016 Act. To buttress this submission, it is submitted that exclusion of the post of Principal is not only discriminatory but also absurd in view of the fact that it is a promotional post for the post of Vice Principal, which is a feeder post and is reserved for the blind persons.

4. It is further submitted that the advertisement also violates the principle of reservation of four percent against the total number of vacancies in a cadre, including both identified and unidentified posts. It is submitted that the respondent has reserved the vacancies against the identified posts only. It is further submitted that the respondent has not been maintaining a vacancy-based roster despite specific directions. Instead, the respondent has been maintaining a post-based roster. The said action, as per the submission, is in complete disregard of the decision of the Hon'ble Supreme Court in Civil Appeal No. 9096/2013 dated 08.10.2013, as well as of Section 34 of the 2016 Act read with Rule 11 of the Rights of Persons with Disabilities Rules, 2017<sup>5</sup>.

5. It is further submitted that the respondent has not computed the backlog of vacancies and has not taken any steps to fill up the vacancies by undertaking a special recruitment drive, which runs completely contrary to the decision of the Hon'ble Supreme Court and the statutory scheme of the 2016 Act.

6. Initially, the petitioner had also challenged the condition regarding non-acceptance of Special B.Ed. course candidates for the post of PGT. It was submitted that the said exclusion was discriminatory and could not be

---

<sup>5</sup>Hereinafter referred as "2017 Rules"



sustained in view of the mandate of the Act. It is also pertinent to note that vide order dated 12.09.2018, this Court had passed an interim order directing that the applications of visually impaired candidates with Special B.Ed. degree be accepted for the post of PGT, subject to final decision of the case. The said order read thus:

*“In the meanwhile, for all such courses, which have been identified for the category in question (visually impaired) offline application of candidates with Special B.Ed. degree should be provisionally accepted for the post of PGT, subject to final decision of this petition.”*

7. Pertinently, at the stage of final hearing as well as in the written submissions, the petitioner did not press the issue regarding Special B.Ed. candidates as the same issue is pending consideration in W.P.(C) No. 6052/2015 titled as ***Score Foundation v. Kendriya Vidyalaya Sangathan & Ors.*** Accordingly, in the interest of justice and consistency of adjudication, we do not propose to consider the said issue and shall refrain from giving our opinion on the same.

8. In response to the petition, the respondent Sangathan has filed a counter affidavit opposing the grounds taken by the petitioner. In response to the ground of exclusion of certain posts in entirety, it is submitted that the Ministry of Social Justice and Empowerment, Government of India, vide notification no. 16-15/2020-DD-III dated 29.07.2013, had circulated a list of posts which were found suitable for persons with disabilities. In response to the said notification, the respondent Sangathan had constituted a Committee which found the following posts to be suitable for visually handicapped persons:



- i. Administrative Officer;
- ii. PGT (English, Hindi, Geography, History, Economics);
- iii. TGT (English, Hindi, Sanskrit, Social Studies);
- iv. Primary Teacher;
- v. PRT (Music, Work Experience);
- vi. Vice-Principal;
- vii. Assistant Section Officer;
- viii. Hindi Translator;
- ix. Senior Secretariat Assistant;
- x. Stenographer Grade-II

However, the following posts were not found to be suitable, on the basis of the nature of job, for visually impaired persons:

- i. Deputy Commissioner;
- ii. Assistant Commissioner;
- iii. Finance Officer;
- iv. Technical Officer;
- v. Principal;
- vi. PGT (Physics, Chemistry, Maths, Biology, Commerce, Bio Tech., Computer Science);
- vii. TGT (Maths, Science, Art Education, P&HE);
- viii. Librarian



9. The respondent submitted that a Principal is required to perform various administrative, financial and academic functions. Furthermore, the Principal is also the Drawing and Disbursing Officer and as such, the Committee took a considered decision to exclude the said post from the posts identified for visually impaired persons.

10. As regards the non-implementation of the statutory four percent reservation, it is submitted that a Committee of KVS Officers was constituted to examine the enhancement of reservation from 3 percent to 4 percent. The Committee, in a meeting held on 31.08.2018, took into consideration the O.M. No. 36035/02/2017-Estt(Res) dated 15.01.2018 issued by the Ministry of Personnel, Public Grievances and Pensions, DoPT, Government of India and resolved to seek exemption from implementing the additional 1 percent reservation, as per the option available in the aforesaid O.M. The Committee resolved to seek exemption primarily on the ground of nature of duties being performed at the Kendriya Vidyalayas.

11. The grounds urged by the respondent were rebutted by the petitioner through an additional affidavit. The petitioner Federation submitted that the respondent has admitted the fact that it has been maintaining and computing the reservation on the basis of posts, and not vacancies. The petition reiterated that the same is violative of Section 34 of 2016 Act, Rule 11 of 2017 Rules and order dated 08.10.2013 passed by the Hon'ble Supreme Court. The petitioner further submitted that the respondent has itself admitted that it has not implemented the enhanced reservation to the extent of 4 percent and the same has been done without taking recourse of the proviso attached with Section 34 of 2016 Act. In the same argument, it is



further submitted that the respondent has not even implemented the 3 percent reservation for the post of teacher as the mode of calculation is subject-wise, instead of calculation of 3 percent against the total number of vacancies, as mandated.

12. As regards the stand taken by the respondent in support of the exclusion of the post of Principal, the petitioner submitted that the stand is contrary to Section 32 of the 2016 Act. To buttress the submission, it is added that the notification dated 29.07.2013 issued by the Ministry of Social Justice & Empowerment was wrongly relied by the respondent for excluding the post of Principal. It is so because the post of Principal was identified as a suitable post for blind persons in the said notification at Sr. No. 713, 767 and 768. The petitioner added that even in the latest notification dated 04.01.2021, the post of Principal was included in the list of identified posts at Sr. No. 278, 1030 and 1031. In addition, the petitioner submitted that the 2013 notification did not empower any department to delete any post from the list of identified posts. It was permissible for a department or establishment to supplement the list and not to delete from it.

13. We have heard the Learned Counsel for the Parties.

14. Having noted the competing grounds raised by the parties before us, we may now lay down the points that arise for our consideration:

- i. Whether the respondent has failed to implement the scheme of reservation at four percent in terms of Section 34 of the 2016 Act;
- ii. Whether the quantum of four percent is to be calculated against the total number of vacancies in a cadre strength or against the number of identified posts;



- iii. Whether the exclusion of the post of Principal from the scope of reservation is ex-facie discriminatory and violative of the 2016 Act;

### **The Background**

15. The Constitution of India envisages special protection for certain classes. One such class is of the persons with disabilities. The Parliament is constitutionally empowered to create special provisions, including reservations in public employment, for persons with disabilities. The notion of special protection stems from the basic feature of equality and equal protection before the law. Our constitutional jurisprudence has unequivocally acknowledged that the principle of equality is not a straight jacket principle, and it duly incorporates the idea of special provisions for certain identified classes. Special protections, cutting through discrimination and discriminatory practices, may very well fall under the umbrella of the equality principle. It is an acknowledgement of the Constitution that all persons in a society are not similarly placed and standards of equality are not to be applied to persons who are differently placed. The existence of a level playing field is a *sine qua non* for equal treatment. By enabling the enactment of special provisions, the Constitution plays its role of an equalizer by creating a level playing field.

16. In furtherance of this constitutional mandate and in furtherance of the 1992 Proclamation on “*Full Participation and Equality of People with Disabilities adopted by the Economic and Social Commission for Asia and Pacific*”, the Parliament enacted the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*<sup>6</sup>,

---

<sup>6</sup> Hereinafter referred as “1995 Act”



which came into force on 7<sup>th</sup> February, 1996. The 1995 Act was a turning point in addressing the long-due concerns of the persons with disabilities. It provided for a mandatory reservation of 3 percent for persons with disabilities in public employment. In 2006, the United Nations adopted the United Nations Convention for Persons with Disabilities<sup>7</sup>. India ratified the convention in 2007. Notably, the 1995 Act was primarily based on a physical inability perspective. The UN Convention, 2006 laid the foundation for a rights-based perspective keeping in view the social as well as the physical factors. The Indian Parliament responded to the demand for a comprehensive legislation and enacted the 2016 Act.

17. As we discuss the legal journey, we may note that the progression has not been on the legislative front alone. Even on the judicial side, we have evolved from a sympathy-oriented approach to a rights-oriented approach. The rights belonging to the persons with disabilities are meant to secure inclusivity and human dignity. Such rights, although statutorily enacted, find their roots in the fundamental rights of life, equality and non-discrimination, as enshrined in the Constitution. The guarantee of equal opportunity to all equally extends to the persons with disabilities and while interpreting the benevolent provisions of the statutes in this regard, the Court must be mindful of the same.

### **Legislative Scheme**

18. The 2016 Act is a landmark social justice legislation for creating an equal participating space for persons with disabilities. It is founded on the principles of equality, non-discrimination and human dignity. Pertinently, it

---

<sup>7</sup> Hereinafter referred as “UN Convention, 2006”



is a manifestation of both affirmative action and prohibitory action. The rights created in the said statute are both positive and negative i.e. positive obligations upon the State and other instrumentalities, and negative rights in the form of prohibition on specified conduct. We may briefly discuss the scheme of the Act.

19. The 2016 Act defines “*discrimination*” as any restriction, distinction or exclusion on the basis of disability as:

*“(h) “**discrimination**” in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation;”*

A government establishment is defined as any body aided or controlled by the Government:

*“(k) “**Government establishment**” means a corporation established by or under a Central Act or State Act or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013) and includes a Department of the Government;”*

As per the definition, it is clear that the respondent Sangathan is a government establishment within the meaning of the Act and is liable to act in accordance with the duties and responsibilities imposed upon government establishments under the Act. Section-3 is a crucial provision as it enjoins the appropriate government, Central Government in this case, to ensure equality and non-discrimination. The provision reads thus:



***“3. Equality and non-discrimination- (1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.***

***(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.***

***(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.***

***(4) No person shall be deprived of his or her personal liberty only on the ground of disability.***

***(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.”***

Section-3, as produced above, lays down a guarantee of equality and non-discrimination in the following terms:

- i. Guarantee of right to equality, life with dignity and respect for integrity of a person with disability at par and equally with others;
- ii. Duty of government to take steps for utilizing the capacity of persons with disabilities by providing appropriate environment. This clause puts a direct onus upon the government to create suitable environment wherein the potential and capacity of persons with disabilities could be utilized. This provision completely negates the oft-quoted argument that persons with disabilities could not be employed or considered for certain employments due to non-availability of requisite infrastructure or suitable conditions. The onus is upon the government to provide appropriate



environment. The onus is not upon the persons with disabilities to adapt with the existing environment at the cost of their dignity and discrimination.

- iii. Even if a person with disability is to be discriminated on any ground, for instance at the time of considering such person for employment, the same cannot be done until and unless two conditions are satisfied – *firstly*, existence of a legitimate aim behind the act in question and *secondly*, the discriminatory effect of the act must be proportionate with the said legitimate aim. Meaning thereby, any discrimination which is not proportionate or commensurate with the requirements of a legitimate goal could not be sustained. The doctrine of proportionality, a doctrine of constitutional importance, is conceptualized on the idea of minimum possible restrictions. It comes into play to ensure that the restrictions or curtailment of rights is done only in cases of utmost necessity in order to achieve a legitimate goal.
- iv. Duty of the appropriate government to take necessary steps for ensuring “reasonable accommodation” for persons with disabilities.

The broad principle in Section-3 of the Act finds a specific manifestation with respect to non-discrimination in employment in Section-20 as follows:

***“20. Non-discrimination in employment- (1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:***



*Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.*

*(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.*

*(3) No promotion shall be denied to a person merely on the ground of disability.*

*(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:*

*Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:*

*Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.*

*(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.”*

Importantly, the standard rule is to ensure non-discrimination in any employment for persons with disabilities. However, the proviso attached with sub-section (1) provides for an exception to the rule and empowers the appropriate government to exempt any “establishment” from the provisions of this Section. Such exemption could be provided only on one parameter – nature of work carried out in such establishment. Additionally, the exemption must be notified and could only be deemed valid if a notification is published in that regard. We may also note that any such exemption would fall within the meaning of “exclusion” or “restriction” as defined in the definition of “discrimination” in Section 2(h) of the Act. Accordingly,



the validity of any such exemption could be tested on the anvil of Section-3(3) of the Act, as discussed above. Meaning thereby, any such exemption must be founded on a legitimate goal and must be proportionate with that goal.

20. Thus understood, the position of law, as it emerges from the above discussion, is that every establishment is bound to take steps and act in accordance with the 2016 Act. If any establishment is exempted, the exemption must be based on the nature of work carried out in such establishment. Furthermore, it must have a legitimate goal and the extent of exemption/exclusion/restriction must be proportionate with that goal. Needless to observe, any such exemption as well as its extent could be tested in a judicial review on the anvil of proportionality, reasonableness, non-arbitrariness and other principles that breathe life and substance in the golden triangle of the Constitution i.e. Articles 14, 19 and 21.

21. Furthermore, Section-33 enjoins the appropriate government to identify posts which could be reserved for persons with benchmark disabilities<sup>8</sup>. It reads thus:

***“33. Identification of posts for reservation- The appropriate Government shall—***

***(i) identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in***

---

<sup>8</sup>**Section-2 (r)-** “person with benchmark disability” means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;



*respect of the vacancies reserved in accordance with the provisions of section 34;*

*(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and*

*(iii) undertake periodic review of the identified posts at an interval not exceeding three years.”*

Section-34 is a key provision for the present enquiry. It provides for statutory reservation of not less than 4 percent of the total number of vacancies in the cadre strength in each group, to be filled by persons with benchmark disabilities.

**“34. Reservation -** (1) *Every appropriate Government shall appoint in every Government establishment, not less than four percent of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one percent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one percent for persons with benchmark disabilities under clauses (d) and (e), namely:*

*(a) blindness and low vision;*

*(b) deaf and hard of hearing;*

*(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;*

*(d) autism, intellectual disability, specific learning disability and mental illness;*

*(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:*

*Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:*



***Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.***

*(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:*

***Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.***

*(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.”*

(emphasis supplied)

The 2<sup>nd</sup> proviso to Section-34 reiterates the provision for exempting certain establishments from providing the mandatory statutory reservation to persons with disabilities. As discussed, the exemption is a conditional one. The following conditions are prescribed for such exemption –

- i. Such exemption could only be granted by the appropriate government (Central Government in this case). Thus, an



establishment, on its own, is not empowered to create any exemption;

- ii. The appropriate government must act in consultation with the Chief Commissioner or State Commissioner, as the case may be;
- iii. Such exemption must be based on the type of work or nature of work carried out in any establishment;
- iv. Such exemption shall come into force only after it is duly published by way of a notification.

### **Discussion**

22. The tone and tenor of the 2016 Act is discernible from the above discussion on the legislative scheme of the Act. The legislative object, constitutional vision and statutory mandate are connected with a uniform link. The 2016 Act categorically provides a minimum reservation of 4 percent for persons with disabilities. Out of the said 4 percent, one percent each is meant for the disabilities mentioned at clauses (a), (b) and (c) in sub-section (1) of Section-34. The remaining one percent is collectively meant for the persons mentioned in clauses (d) and (e) of the same provision. The issue here is regarding the computation of reservation. Sub-section (1) to Section-34 clearly provides that the vacancies shall be reserved against the “total number of vacancies” in the cadre strength in each group of posts.

23. In order to steer clear from the statutory requirement of minimum 4 percent reservation, the respondent has relied upon a resolution passed in a Committee meeting on 31.08.2018. Notably, the meeting was held in furtherance of O.M. No. 36035/02/2017-Estt. (Res) dated 15.01.2018 issued



by the Ministry of Personnel, Public Grievances and Pensions, DoPT, Government of India. The said O.M. was issued to give effect to the mandate of 2016 Act read with the 2017 Rules. It is nothing but a set of instructions for the government establishments for implementing the scheme of reservations under the 2016 Act. The instructions are largely replicated from the Act itself. It reiterates the mandate of minimum 4 percent reservation for persons with disabilities as per the categorization mentioned in Section-34 of the Act. Clause-3 of the O.M. provides for “Exemption from Reservation” as:

**“3. EXEMPTION FROM RESERVATION:**

*If any Ministry/Department in the Central Government considers it necessary to exempt any establishment or any cadre or cadres fully or partly from the provisions of reservation for persons with benchmark disabilities, it shall make a reference to the Department of Empowerment of Persons with Disabilities giving full justification for the proposal, who having regard to the type of work carried out in any Government establishment by notification and subject to such condition, if any, as may be specified in the notification, in consultation with the Chief Commissioner for Persons with Disabilities (CCPD) may exempt any Establishment or any cadre(s) fully or partly from the provisions of reservation for persons with benchmark disabilities.”*

(emphasis supplied)

It categorically provides that if any department considers it necessary to exempt any establishment or cadre from the provisions of the Act, it shall make a reference to the Department of Empowerment of Persons with Disabilities giving full justification for the same. The mode and manner of



exemption is strictly based on the scheme envisaged in the 2016 Act, as discussed above. There is no deviation from the same.

24. Furthermore, Clause-6 of the O.M. provides for “*Computation of Number of Posts to be Reserved*” as follows:

**“6. COMPUTATION OF NUMBER OF POSTS TO BE RESERVED:**

*6.1 The number of posts to be reserved for persons with benchmark disabilities in case of Group C posts shall be computed on the basis of total number of vacancies in the cadre strength of Group C posts, in the establishment, although the recruitment of the persons with benchmark disabilities would only be against the category of posts identified suitable for them. The number of vacancies to be reserved for the persons with benchmark disabilities in case of direct recruitment to Group 'C' posts in an establishment shall be computed by taking into account the total number of vacancies arising in Group 'C' posts for being filled by direct recruitment in a recruitment year both in the identified and non-identified category of posts under the establishment. Since reservation, wherever applicable, for Persons with Benchmark Disabilities is provided computing total number of vacancies in the cadre strength in identified category of posts as well as unidentified category of posts, it may be possible that number of persons appointed by reservation in an identified category of post may exceed four per cent.*

*6.2 Reservation for persons with benchmark disabilities in Group 'A' or Group 'B' posts shall be computed on the basis of total number of vacancies occurring in direct recruitment quota in the cadre in all the Group 'A' posts or Group 'B' posts respectively, and the computation of total vacancies shall include vacancies arising in the identified and non-identified category of posts.”*

(emphasis supplied)



The aforesaid clause offers a crucial guiding mechanism for the computation of reservation, as contemplated by the statute. On a literal and grammatical reading of Clause-6, it becomes clear that the reservation is to be computed on the total number of vacancies in the cadre strength of a group. Such total number of vacancies may include both identified and unidentified posts. Once the number of posts to be reserved is calculated to the extent of 4 percent on the total number of vacancies, actual appointment of the persons with disabilities shall take place against the posts identified to be suitable for them under Section-33 of the Act. Sub-clause 6.1 further clarifies that it may be possible that the number of persons appointed against the identified category of posts may even exceed 4 percent. The same is permissible.

25. The method of computation is further refined in Rule-11 of the 2017 Rules, which reads thus:

***“11. Computation of vacancies.- (1) For the purposes of computation of vacancies, four percent of the total number of vacancies including vacancies arising in the identified and non-identified posts in the cadre strength in each group of posts shall be taken into account by the appropriate Government for the persons with benchmark disabilities:***

*Provided that the reservation in promotion shall be in accordance with the instructions issued by the appropriate Government from time to time.*

*(2) Every Government establishment shall maintain a vacancy based roster for the purpose of calculation of vacancies for persons with benchmark disabilities in the cadre strength as per the instructions issued by the appropriate Government from time to time.*

*(3) While making advertisement to fill up vacancies, every Government establishment shall indicate the number of*



*vacancies reserved for each class of persons with benchmark disabilities in accordance with the provisions of section 34 of the Act.*

*(4) The reservation for persons with disabilities in accordance with the provisions of section 34 of the Act shall be horizontal and the vacancies for persons with benchmark disabilities shall be maintained as a separate class.”*

Sub-rule (1) categorically provides that the computation of 4 percent vacancies shall be done on both identified and non-identified posts collectively. Sub-rule (2) imposes a further obligation on a government establishment to maintain a vacancy-based roster for the purpose of calculation of vacancies.

26. For the purpose of computation, we may usefully refer to the order dated 08.10.2013 passed by the Hon’ble Supreme Court in Civil Appeal No. 9096/2013. In the said decision, the Court discussed the mandate of the erstwhile legislation i.e. 1995 Act in order to lay down the principles for computation of vacancies to be reserved for the persons with benchmark disabilities as per statutory scheme of reservation under the Act. The Court relied upon the decision in ***Govt. of India through Secretary and Anr. vs. Ravi Prakash Gupta & Anr.***<sup>9</sup> (a case in context of 1995 Act) and observed thus:

*“29) In the light of the above pronouncement, it is clear that the scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled persons and is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act. In succinct, it was held in Ravi Prakash Gupta (supra) that Section 32 of the Act is not a precondition for computation of*

---

<sup>9</sup>(2010) 7 SCC 626



*reservation of 3% under Section 33 of the Act rather Section 32 is the following effect of Section 33.*

*30) Apart from the reasoning of this Court in Ravi Prakash Gupta (supra), even a reading of Section 33, at the outset, establishes vividly the intention of the legislature viz., reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of Section 33 and from the construction of the said statutory provision only one meaning is possible.*

(emphasis supplied)

27. The computation method, as discussed above, makes it unambiguously clear that the identified posts come into picture only after recruitment and only at the time of actual appointment. At the stage of recruitment and advertisement of vacancies, the respondent is duty bound to reserve 4 percent of the total number of vacancies, inclusive of vacancies against identified as well as unidentified posts. Once recruited, appointment can be made against the posts identified as suitable for respective categories of persons with disabilities. Even otherwise, it would be absurd to carry out calculation of 4 percent against identified posts only. In such a manner, the actual vacancies reserved for persons with disabilities would fall disproportionately short of the total number of vacancies and would never meet the 4 percent criteria, as envisaged. The same would defeat the mandate of the legislation. Therefore, identification under Section-33 is not a precondition for extending the benefit of reservation under Section-34 of the 2016 Act.



28. As per the impugned advertisement, the category of “Others” in the last row indicates the vacancies reserved for the persons with benchmark disabilities falling in clauses (d) and (e) of Section-34 for whom at-least 1 percent collective reservation is mandatory. For the post of Principal, Vice-Principal, PGTs, Librarian, Primary Teacher and Primary Teacher (Music), no vacancy whatsoever is reserved for the categories in clauses (d) and (e). This is completely violative of the requirement of mandatory reservation of 1 percent for the said categories of persons. The only way in which the respondent could have excused itself from giving effect to the reservation criteria was by availing exemption in accordance with Section-34 of 2016 Act read with Rule 11 of the 2017 Rules. No such exemption was granted to the respondent.

29. We may also note that the respondent has calculated the reservation in a subject-wise manner in the advertisement i.e. after bifurcating the vacancies against different subjects within the same cadre and reserving against eligible/identified subjects only. For instance, in PGT category, only 12 vacancies are reserved for persons with benchmark disabilities out of 592 vacancies. The calculation is made in a manner that some of the subjects have no reserved vacancy for the persons with benchmark disabilities. Going by the criteria of minimum 4 percent, the respondent ought to have reserved at-least 23 vacancies for the persons with benchmark disabilities across all five categories mentioned in Section-34. No doubt, a minimum of 1 percent must have been reserved for the categories at clauses (a), (b) and (c), and remaining 1 percent for the categories in clauses (d) and (e) collectively. The effect of reserving the vacancies subject-wise is to preclude the very idea of



reservation against the total number of vacancies inclusive of both identified and unidentified posts. In this advertisement, the respondent has indicated reservation only against some subjects in a selective manner. Even if the approach is to exclude the subjects which cannot be taught by persons with disabilities, the same is impermissible at the time of reservation of vacancies. For, the same would amount to calculation of vacancies against identified posts. The mandate of reservation is unaffected by the identification of posts. The O.M. dated 15.01.2018, in Clause-6, makes it clear that the computation must be against the total number of vacancies in the cadre strength. It may happen that at the time of appointment, the persons with disabilities appointed for any subject may exceed 4 percent. However, the same is permissible in law. Therefore, the respondent has failed to implement the reservation criteria as per Section-34 in the impugned advertisement and the same is set aside.

30. The respondent has not only failed to calculate the reserved vacancies as per law but has also sought to justify the failure to reserve 4 percent vacancies by referring to the aforesaid O.M. However, contrary to the O.M., no exemption from mandatory reservation of 4 percent has been sought by the respondent. Therefore, the respondent was bound to conduct computation of reservation in accordance with Clause-6 of the aforesaid O.M.

31. In order to exclude the post of Principal, the respondent has relied upon the notification no. 16-15/2020-DD-III dated 29.07.2013 issued by Ministry of Social Justice and Empowerment, Government of India, whereby certain posts were identified as suitable for reservation for the



persons with disabilities. The said list of posts was released by the Ministry as a guiding principle for the government establishments while providing statutory reservation to the persons with disabilities. It was done in accordance with Section-33 of the 2016 Act which empowers the appropriate government to conduct the exercise of identification of posts to be reserved under Section-34. One of the key purposes of the said list was also to ensure that different government establishments do not implement the statutory mandate at their own whims and fancies. In other words, the list was meant to preclude a situation wherein the same post is reserved by one department and is excluded by the other. Importantly, in the said list, the post of Principal was identified as a suitable post for persons with disabilities i.e. an identified post.

32. In the aftermath of the publication of this list, the respondent constituted its own Committee which did a bifurcation of the list. After bifurcation, the list was split into two categories – posts suitable for reservation and posts not suitable for reservation. As per this bifurcation, the respondent excluded the post of Principal from the list of identified posts for persons with visual disability. The said exclusion also reflected in the impugned advertisement, thereby giving cause for this litigation.

33. However, as discussed above, the primary function of identification of posts is of the appropriate government, as per Section-33 of the Act. There is no power with the respondent or its committee to revisit and cut short the list notified by the government. The process of identification or its review is to be carried out by the appropriate government only. Further, the said exercise is to be carried out after constitution of an expert committee with due



representation of persons with benchmark disabilities. Furthermore, the list is to be reviewed after every three years in accordance with the same procedure. The appropriate government in the present case is the Central Government and as per the mandate of Section-33, the Central Government completed the exercise of identification in accordance with law. The said exercise culminated in the form of a list of identified posts.

34. Once certain posts are identified, the government establishments bound by it shall mandatorily reserve the vacancies against the identified posts. No doubt, in addition to the posts identified by the appropriate government, the establishments may identify more posts if found suitable at their own level. However, the posts already identified under Section-33 could not be excluded by any establishment, except in accordance with 2<sup>nd</sup> proviso to Section-34. There is no other method which could lead to the exclusion of any post which has been identified for reservation by the appropriate government. As noted by us in the discussion on legislative scheme, such exclusion could only be carried out on the basis of the nature of work and by the appropriate government only. Furthermore, it could only be done after consultation with the Chief Commissioner appointed under the 2016 Act and through a notification. Therefore, the respondent Sangathan, which is an establishment under the Central Government, could not have excluded the post of Principal from the list of identified posts, except in accordance with the procedure discussed herein. In this case, the exclusion was carried out by a resolution of the respondent after a meeting of a Committee. The respondent establishment failed to comply with the procedure and went on to exclude the said post without any consultation and



without any notification by the appropriate government. The said procedure is unknown to the scheme of 2016 Act. The respondent or the Committee of the respondent exercised a power which never vested in it.

35. We may usefully note that the power of identification of posts is bound by a procedure which, amongst other things, involves consultation with experts including persons with disabilities. The persons with disabilities are the direct stakeholders in this exercise and the legislature has aptly carved out a provision for a consultative exercise with such persons. It is manifestation of the principles of natural justice and there can be no deviation from the statutory procedure. Exclusion of a post, without engaging in a consultative exercise, shall also be violative of the principles of natural justice.

36. It is a settled rule of interpretation that when the manner of performance of an act is prescribed by law, the 2016 Act in this case, such act is to be performed in that manner only, or not at all. In *State of U.P. v. Singhara Singh*<sup>10</sup>, the Hon'ble Supreme Court, relying upon the landmark decision in *Taylor v. Taylor*<sup>11</sup>, laid down the principle of law in the following words:

***“8. The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A***

---

<sup>10</sup> AIR 1964 SC 358

<sup>11</sup> [(1875) 1 Ch D 426]



*Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.”*

(emphasis supplied)

Further, in *CIT v. Anjum M.H. Ghaswala*<sup>12</sup>, the principle was reiterated by a 5 judges’ bench of the Hon’ble Supreme Court as:

*“27. Then it is to be seen that the Act requires the Board to exercise the power under Section 119 in a particular manner i.e. by way of issuance of orders, instructions and directions. These orders, instructions and directions are meant to be issued to other income tax authorities for proper administration of the Act. The Commission while exercising its quasi-judicial power of arriving at a settlement under Section 245-D cannot have the administrative power of issuing directions to other income tax authorities. **It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself.** If that be so, since the Commission cannot exercise the power of relaxation found in Section 119(2)(a) in the manner provided therein it cannot invoke that power under Section 119(2)(a) to exercise the same in its judicial proceedings by following a procedure contrary to that provided in sub-section (2) of Section 119.”*

(emphasis supplied)

---

<sup>12</sup>(2002) 1 SCC 633



37. After the list published in 2013, the Ministry of Social Justice and Empowerment, Government of India notified another list, under Section-33 of 2016 Act, vide notification no. 38-16/2020-DD-III. dated 04.01.2021. As per this list as well, the post of Principal fell in the category of identified posts for reservation. Note-2 annexed with the notification is in line with our observation that the respondent establishment could only have supplemented the list and could not have curtailed it by excluding any post. It reads thus:

*“Note 2: The list of posts being notified is only indicative and not an exhaustive list. If a post is not mentioned in the list, it is not to be construed that it has been exempted. Central Ministries, Departments, Autonomous Bodies, Public Sector Undertakings may further supplement the list by adding to the list of posts identified for respective category of disability.”*

(emphasis supplied)

38. The petitioner’s submission that the post of Vice-Principal is a feeder grade post to the post of Principal, which is a promotional post after the post of Vice-Principal, also holds merit. Note 4 annexed with the aforesaid notification is relevant in this regard and the same is reproduced thus:

*“Note 4: If a post is identified in the feeder grade, all the posts in the promotional grade should also stand identified.”*

The above note makes it clear that the post of Principal, being a post in the promotional grade, stands automatically identified for reservation as the post of Vice-Principal is identified. Although, reference to Note-4 is not required as the post of Principal is expressly identified by the Central Government. Note-4 would come into play in case a promotional grade is not identified but the feeder post is identified. Be that as it may, it is



indicative of the fact that the post of Principal could not be excluded on any parameter.

39. The impugned advertisement is to be read in light of the notification enlisting the identified posts as per Section-33 (2016 Act) and Section-32 (1995 Act). Notably, the list is in a tabular form and mentions the specific category of benchmark disability which is eligible for a given post. The post of Principal can be filled by “a) B, LV; b) D, HH; c) OA, BA, OL, BL, LC, Dw, AAV; d) SLD, MI; e) MD involving (a) to (d) above”. These categories are directly lifted from Section-34 of the 2016 Act, thereby meaning that the post of Principal is eligible to be filled by all the categories of persons mentioned at clauses (a) to (d) in Section-34 of the Act. Understood accordingly, it can be said that the test of suitability with respect to the post of Principal has already been carried out by the appropriate government and could not have been revisited by the respondent in the advertisement.

40. In light of the above discussion, it is certain that the power of identification as well as exemption of posts from the statutory mandate of reservation vested only with the appropriate government and not with the respondent establishment. Accordingly, the act of exclusion of the post of Principal cannot be sustained and is accordingly, set aside.

41. We may regretfully note that despite the passage of almost four decades of the movement, one United Nations’ Convention and two legislations passed by the Parliament, we are struggling to fulfil our promises made to the persons with disabilities as our fellow citizens. The journey so far has tried to achieve twin objectives – fulfilment of constitutional promises and reformation of mindsets. However, every now



and then, seemingly settled issues resurface in the recruitments opened by different departments or by different governments. Every time a judicial forum is asked to revisit and reiterate the same principles, that too for the protection of the vulnerable sections, it only reflects a status quoist approach on the part of the departments and establishments. The legislature has taken a commendable leap with the enactment of 2016 Act, but the process of implementation of the legislative wisdom is challenging. For, reformation of mindsets is a gradual process. From 1995 to 2016, the legislative wisdom experienced a significant growth. However, the status quoist approach in implementation of the legislation in its true spirit still prevails. We are reminded of the classic French expression - *Plus ça change, plus c'est la même chose* – which means “*the more things change, the more they stay the same*”.

42. The 2016 Act defines “discrimination” as any form of distinction, restriction or exclusion on the basis of disability, which has the effect of nullifying the enjoyment of human rights and fundamental freedoms at par with others. Interestingly, the definition incorporates both direct as well as indirect discrimination. Recently, in *Nitisha v. Union of India*<sup>13</sup>, Hon’ble Supreme Court of India, speaking through *D.Y. Chandrachud J.*, engaged in a comprehensive and eloquent discussion on the concepts of direct and indirect discrimination. After a comparative analysis of the prevailing jurisprudence in various jurisdictions such as United States, United Kingdom, Canada and South Africa, the Court evolved a framework of indirect discrimination in India. It observed that discrimination is not always

---

<sup>13</sup>(2021) 15 SCC 125



a result of conscious design or malicious intent to discriminate, rather, it may be an outcome of implicit biases. Indirect discrimination may also result from an inability to acknowledge how existing practices may have the consequence or *effect* of upholding a discriminatory status quo. The relevant observations read thus:

***“F.6. Evolving an analytical framework for indirect discrimination in India***

*70. A study of the above cases and scholarly works gives rise to the following key learnings. First, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognise how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust status quo. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.*

(emphasis supplied)

The Court further observed that the “*intention effects distinction*” could be a sound jurisprudential basis to distinguish direct and indirect discrimination. Whereas, the former is based on an intent to discriminate, the latter is concerned with the ultimate discriminatory effect of an act, irrespective of the intent behind the act. The relevant observations read thus:

*71. Second, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact that the former cannot be justified, while the latter can (UK). We are of the considered view that the intention effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This*



*is for the reason that the most compelling feature of indirect discrimination, in our view, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect. As the Canadian Supreme Court put it in Ontario HRC [Ontario Human Rights Commission v. Simpsons Sears Ltd., 1985 SCC OnLine Can SC 75, requiring proof of intention to establish discrimination puts an “insuperable barrier in the way of a complainant seeking a remedy”. [Ontario Human Rights Commission v. Simpsons Sears Ltd., 1985 SCC OnLine Can SC 75, para 14. It is this barrier that a robust conception of indirect discrimination can enable us to counteract”*

(emphasis supplied)

The above analysis authoritatively holds that the concept of indirect discrimination intends to prohibit any conduct which has the “effect” of discrimination, even if it was not intended so. The distinction is relevant in light of the definition of “discrimination” under Section-2 of the 2016 Act, as noted above. The usage of the word “effect” in Section-2 indicates that the Act is not only intended to curb direct discrimination, but is equally intended to prohibit any indirect discrimination which may result from inherent or institutional bias, stereotypes or a status quoist approach. The attitudinal and environmental barriers, that prevent the persons with disabilities from exercising their fundamental freedoms and human rights to the fullest, are a form of indirect discrimination.

43. The impugned advertisement distinguishes the persons with disabilities from others, and puts a restriction on their potential to participate in the recruitment process to their full ability. The distinction is purely on the basis of disability. The advertisement has the effect of excluding the persons with disabilities from the race of recruitment, in complete violation of the mandatory reservation provision. It may be noted that an act of



discrimination is not only a denial of the promise of equal protection before the law. Rather, every act of exclusion is an assault on the dignity of a person. More so, when the exclusion has the effect of compelling the persons with disabilities out of a race for gaining employment, without any fault of theirs. Instead of providing an equal space to grow, we have been compelling the persons with disabilities to prove, time and again, that they are capable of a lot more than we think.

44. In light of the above discussion, we find the advertisement to be unsustainable. It is discriminatory and violative of the 2016 Act read with 2017 Rules. Accordingly, we issue the following directions:

- i. The respondent shall conduct an audit of the total number of vacancies in the establishment and shall prepare a vacancy based roster as per Rule-11 of the 2017 Rules within 3 months from the date of this order. The respondent shall file an affidavit of the same along with a timeline of recruitment for filling the said vacancies;
- ii. If any vacancy, which ought to have been reserved in accordance with the 2016 Act, has already been filled by any person not falling in the reserved category due to failure of the respondent to reserve the same, the respondent shall adjust those vacancies from the unreserved pool of the available vacancies. Such vacancies shall be deemed to be unfilled and accordingly, shall be considered to have been carried forward from the vacancies notified in the impugned advertisement;



- iii. The respondent shall implement the 4 percent reservation strictly in accordance with Section-34, with minimum one percent to be earmarked for the categories listed at clauses (a), (b), (c), (d) and (e) in Section-34;
  - iv. The respondent shall compute the number of vacancies to be reserved for the persons with disabilities against the total number of vacancies in the cadre strength in each group, inclusive of both identified and unidentified posts;
  - v. The final appointment shall be made against the identified posts, even if the actual number of persons with disabilities appointed at a given post exceeds four percent;
  - vi. The respondent shall not create sub-categories subject-wise within a cadre. The vacancies shall be calculated on the total number of vacancies in a particular cadre and not on posts;
  - vii. The respondent shall reserve the post of Principal for persons with benchmark disabilities in blind or low vision category at a minimum of one percent for that particular category;
  - viii. No deviation from the statutory rule or exclusion of any post shall be made, except in accordance with the exemption clause and after proper notification by the appropriate government;
45. In light of these directions, we dispose of the petition. No order as to costs.



46. We express our thanks to Ld. Counsels for the parties for their able assistance in the matter.

**(SATISH CHANDRA SHARMA)**  
**CHIEF JUSTICE**

**(SANJEEV NARULA)**  
**JUDGE**

**OCTOBER 16, 2023**